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Trust Revocation: Do Trust Terms Prevail Over California Civil Code Section 2280?

Trusts in real property or personalty may be either inter vivos, which take effect during the lifetime of the settlor, or testamentary, which take effect upon the death of the settlor. An inter vivos trust¹ may be either revocable² or irrevocable.³ A power of revocation can be created either by the settlor in the trust instrument or by operation of law. Once a power of revocation exists, several ways to accomplish revocation are possible in California. If the terms of the trust do not specify a revocation method, California Civil Code section 2280⁴ (hereinafter section 2280) allows the trustor to revoke by filing a writing with the trustee. A problem arises when a trust specifies a method of revocation that requires a different procedure than that of section 2280. If the trustor attempts to revoke by complying with section 2280, the validity of the attempted revocation is in question because the revocation does not comply with the strict terms of the trust. In certain situations, requiring strict compliance with trust revocation terms leads to unfair results, defeating some of the purposes of creating a revocable trust.

Typically, litigation arises when the administrator or executor of the estate of a decedent sues the trustee of an inter vivos trust created by the decedent.⁵ The plaintiff claims that the decedent-trustor had successfully revoked the trust. The issue in these cases is whether title to the trust property passed to the estate.

1. This comment will discuss only inter vivos trusts.

2. The term "revocable trust" means a trust in which the settlor reserves the power to revoke the trust. BLACK'S LAW DICTIONARY at 1187 (5th ed. 1979).

3. The term "irrevocable trust" means a trust in which the settlor has no power to terminate the trust. *Id.* at 744.

4. Unless otherwise specified, all references to the Civil Code in this comment are to California Civil Code section 2280, which states:

Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. Trusts created prior to the date when this act shall become a law shall not be affected hereby.

CAL. CIV. CODE §2280.

5. See, e.g., *Rosenauer v. Title Ins. & Trust Co.*, 30 Cal. App. 3d 300, 301, 106 Cal. Rptr. 321, 322 (1973).

The California appellate courts have reached conflicting results on the issue of the validity of an attempted revocation under section 2280 that does not comply with the strict terms of the trust.⁶ This comment will suggest a resolution of the controversy after examining important principles of trust law, statutory construction, equity, and public policy.⁷ Examining these principles will show that a flexible approach toward revocation provides a more fair result.

A trust revocation should be valid if the method complies with section 2280 even though the method does not comply with the terms of the trust. Strict compliance with the trust revocation method does not always produce the better result. This comment describes circumstances in which permitting revocation by compliance with section 2280 is more equitable.⁸ The trustor should not be locked into a formalized revocation procedure that may have been included in the trust instrument without proper reflection. A requirement of strict compliance with the trust terms is especially unfair for a revocation that would have been valid under section 2280 had the trust been silent or ambiguous about the revocation procedure.

THE REQUIREMENT OF STRICT COMPLIANCE WITH THE TERMS OF A TRUST

A requirement of strict compliance with the trust terms in order to revoke a trust can lead to unjust results. Often, technical omissions on the part of the trustor will operate to frustrate the actual intent of the trustor. One illustration of this type of situation is found in the case of *Hibernia Bank v. Wells Fargo Bank*.⁹

In *Hibernia*, the trustor created a revocable inter vivos trust but later decided that she no longer wanted the primary beneficiary to benefit from the trust.¹⁰ While confined to the hospital during her last illness, the trustor executed a writing manifesting a clear intent

6. Compare *Fernald v. Lawsten*, 26 Cal. App. 2d 552, 561, 79 P.2d 742, 747 (1938) and *Title Ins. & Trust Co. v. McGraw*, 72 Cal. App. 2d 390, 399, 164 P.2d 846, 850-51 (1945) (examples of revocation upheld) with *Rosenauer*, 30 Cal. App. 3d 300, 106 Cal. Rptr. 321, 323 and *Hibernia Bank v. Wells Fargo Bank*, 66 Cal. App. 3d 399, 404, 136 Cal. Rptr. 60, 63 (1977) (examples of revocation denied).

7. See *infra* notes 17-38 and accompanying text (discussion of trust law principles); notes 96-108 and accompanying text (discussion of statutory construction rules); notes 109-13 and accompanying text (discussion of equity principles); and notes 114-28 and accompanying text (discussion of policy principles).

8. See *infra* notes 83-95 and accompanying text (analysis of cases).

9. 66 Cal. App. 3d 399, 136 Cal. Rptr. 60 (1977).

10. *Id.* at 401-02, 136 Cal. Rptr. at 60-61.

to revoke the trust.¹¹ The writing satisfied Civil Code section 2280 but failed to comply with certain detailed provisions¹² for revocation contained in the trust. Because of the noncompliance by the trustor with the strict provisions of the trust, the court held that the revocation was ineffective.¹³

By refusing to treat these actions as constituting a valid revocation, the court frustrated the clear intent of the trustor.¹⁴ Furthermore, refusal to recognize a revocation here undermines the intent of the legislature in enacting the trust revocation procedure in section 2280.¹⁵ Refusal to validate the revocation also detracts from recognized policy considerations and equity principles, both of which underlie modern California trust law.¹⁶ Situations like that involved in the *Hibernia* case deserve careful balancing of competing interests, to avoid unjust results that frustrate the intent of the trustor, while not promoting opposing policies. Before analyzing these opposing considerations, this comment will examine important trust principles.

APPLICABLE TRUST PRINCIPLES

No particular language is necessary to create a trust, and the words "trust" or "trustee" need not be used for a court to find that a trust exists.¹⁷ The California Civil Code, however, does define the minimum requirements for trust formation.¹⁸ If evidence exists that the creation

11. See *infra* note 118 and accompanying text, discussing importance of respecting intent of trustor to revoke. *Id.*

12. The provisions not satisfied in *Hibernia* dealt with notice to trustee (*Hibernia*, 66 Cal. App. 3d at 402, 403, 136 Cal. Rptr. at 62). One commentator suggests that this type of flaw in the attempted revocation should not always defeat the validity of the revocation. See *infra* notes 122-24 and accompanying text (discussion of revocation provisions solely for benefit of trustee).

13. *Hibernia*, 66 Cal. App. 3d 399, 404, 136 Cal. Rptr. 60, 63 (1977).

14. See *infra* note 118 and accompanying text (discussion of intent of trustor).

15. See *infra* notes 96-108 and accompanying text (discussion of rules of statutory construction leading to presumption that, in amending section 2280 to its current form, the legislature intended to liberalize revocation in California).

16. See *infra* notes 109-13 and accompanying text (discussion of equity principles); and see *infra* notes 114-28 and accompanying text (discussion of policy considerations).

17. See McGraw, 72 Cal. App. 2d at 398, 164 P.2d at 850 (trust found in conveyance of property to defendant under circumstances that negated an inference of intent to convey title absolutely) (citing *Weiner v. Mullaney*, 59 Cal. App. 2d 620, 631, 140 P.2d 704, 710 (1943) and *Hardison v. Corbett*, 55 Cal. App. 2d 310, 318, 130 P.2d 226, 230 (1942)); *Wells Fargo Bank v. Greuner*, 226 Cal. App. 2d 454, 460, 38 Cal. Rptr. 132, 135 (1964) (voluntary trust arose when father assigned life insurance policies to son, who orally agreed to put policies in trust for benefit of family of father, even though son gave no consideration and paid no premiums).

18. CAL. CIV. CODE §222 provides in part,

. . . a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty: 1. An intention on the

of the trust is a result of fraud, duress, undue influence, or mistake, the settlor or his successors in interest may have the trust rescinded.¹⁹

The validity of the trust also depends upon the state of the title in the trust property. A major identifying feature of a trust is the separation of legal and equitable or beneficial title in the subject matter of the trust.²⁰ Legal title is held by the trustee, and equitable title is held by the beneficiary.²¹ If, after creation of the trust, the legal title and beneficial interest become vested in one person, as is the case when the sole beneficiary becomes the sole trustee, the equitable doctrine of merger may apply to terminate the trust since no purpose of the settlor can be achieved by continuing the trust.²²

Since the courts can apply the merger doctrine whenever the sole beneficiary becomes the sole trustee, equity permits a settlor to revoke a trust in which he has the power to modify the trust and make himself the sole beneficiary and sole trustee.²³ In this situation, if Civil Code section 2280 is satisfied, the revocation should be upheld despite failure to comply strictly with the trust terms, since the trust could have been terminated by merger. Another way for a trust to be terminated is through revocation by the settlor.

A. Power of Revocation Generally

If the settlor exercises a power of revocation, the trust property reverts to the trustor or the estate of the trustor, in the absence of an express provision to the contrary.²⁴ Powers of revocation are a valuable tool in

part of the trustor to create a trust; and 2. The subject, purpose, and beneficiary of the trust.

CAL. CIV. CODE §2216 defines a voluntary trust as “. . . an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another.”

19. See A. Scott, *The Law of Trusts* §329A, at 2593 (1967); see also CAL. CIV. CODE §1640, providing that “[w]hen, through fraud, mistake, or accident, a written contract [e.g., trust] fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded.” This comment assumes that all trusts were validly created but that the trustor later changed his mind and wished to revoke the trust.

20. *Craven v. Dominguez Estate Co.*, 72 Cal. App. 713, 717-18, 237 P. 821, 823 (1925); see also CAL. CIV. CODE §863, which provides in part, “[E]very express trust . . . vests the whole estate in the Trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.”

21. The beneficiary is often the same person as the trustor.

22. The doctrine of merger operates to terminate a trust since the continued existence of a trust depends on the separation of legal and equitable title in the trust property. *Estate of Washburn*, 11 Cal. App. 735, 746, 106 P. 415, 420 (1909); see also CAL. CIV. CODE §2279, providing for extinction of a trust by the entire fulfillment of the object of the trust.

23. See *infra* note 117 and accompanying text (discussion of power of trustor to extinguish interests of beneficiaries).

24. See *Mallon v. Long Beach*, 44 Cal. 2d 199, 208, 282 P.2d 481, 487 (1955) (trust in lands granted to city reclaimed by state for application to other uses); see also CAL. CIV. CODE

the flexible estate plan for several reasons.²⁵ Approaches to revocability vary in different jurisdictions, however.

1. Majority view

Despite the many advantages of powers of revocation, most jurisdictions do not favor flexible revocation procedures. Under the common law and majority view in the United States, the settlor has no power to revoke a trust and compel reconveyance of the *res*²⁶ without expressly reserving such a power in the trust instrument.²⁷ The Restatement of Trusts follows the majority view.²⁸

The rationale for the majority view on revocability is that the creation of a trust amounts to a conveyance of property, and a change

§2280. The process of revocation should be distinguished from the process of extinction. Revocation occurs when the settlor voluntarily exercises a power of revocation. See *supra* note 1 and accompanying text; see, e.g., *Fleishman v. Blechman*, 148 Cal. App. 2d 88, 95, 306 P.2d 548, 552 (1957). Extinction occurs when the trust purpose has been fulfilled or becomes impossible or illegal. See CAL. CIV. CODE §2279, providing that "[a] trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful."

25. A primary advantage is that the trust may provide for distribution of the trust property to the beneficiaries upon the death of the settlor without becoming part of the probate estate. See generally Keydel, *Advantages of the Revocable Trust Estate Plan*, 54 MICH. ST. B.J. 22 (1975). For a discussion of tax implications, see generally Sacher, *Estate Planning and the Partially Irrevocable Trust: Another View of United States v. Byrum*, 48 NOTRE DAME LAW. 581 (1973). For irrevocable trusts, if the settlor retains no interest in the trust the income is taxed to the beneficiaries or to the trust itself, but gift tax may attach to the donor. See G. BOGERT, LAW OF TRUSTS §148, at 535 n.13, 536 n.14 (1973). State law controls the question of revocability for purposes of determining federal tax consequences. See *Filtercroft v. Comm'r of Int'l Rev.*, 328 F.2d 449, 454 (9th Cir. 1964). For an article that addresses one aspect of taxes in California trust law, see Note, *Trusts: Power To Revoke In Part As Including Power To Terminate*, 45 CALIF. L. REV. 556, 559-60 (1957). See generally Miller and Rainey, *Dying With the "Living" (or "Revocable") Trust: Federal Tax Consequences of Testamentary Dispositions Compared*, 37 VAND. L. REV. 811 (1984); and Desmond, *Revocable Trust After Death of Grantor*, 116 TR. & EST. 218 (1977) (tax consequences of the revocable trust).

26. Subject matter. BLACK'S LAW DICTIONARY at 1172 (5th ed. 1979).

27. See G. BOGERT, LAW OF TRUSTS §148, at 531 (1973); see also A. SCOTT, THE LAW OF TRUSTS §329A, at 2593-95 (1967). One commentator suggests that the rule in favor of irrevocability can be traced to early English common law and is probably derived from the general law of gifts. G. Bird, Commentary, *Trust Termination: Unborn, Living, and Dead Hands—Too Many Fingers in the Trust Pie*, 36 HASTINGS LAW J. 565 n.5 (1985).

28. RESTATEMENT (SECOND) OF TRUSTS §330 (1957) provides:

- (1) The settlor has power to revoke the trust if and to the extent that by the terms of the trust he reserved such a power.
- (2) Except as stated in §§332 [power of revocation or modification omitted by mistake] and 333 [rescission and reformation], the settlor cannot revoke the trust if by the terms of the trust he did not reserve a power of revocation.

Bogert suggests that if no procedure for termination of the trust is prescribed, the power of revocation may be exercised in any reasonable manner that sufficiently evidences the intention of the settlor to revoke the trust. BOGERT, LAW OF TRUSTS §148, at 535 (1973); see also A. SCOTT, THE LAW OF TRUSTS §330.7 at 2605 n.1 (1967); see, e.g., SCOTT at §331.1, at 2621 n.2, citing *Lambdin v. Dantzbecker*, 169 Md. 240, 181 A. 353, 102 A.L.R. 277 (1935); *Security Trust Co. v. Spruance*, 20 Del. Ch. 195, 174 A. 285 (1934) (execution of new trust instrument declaring a trust on different terms was a sufficient revocation of earlier trust). A trust may not be terminated by a mere oral declaration of the trustor. *Taylor v. Bunnell*,

of mind or dissatisfaction with the operation of the trust is not considered a valid reason to permit revocation absent an express provision.²⁹ Even under the majority view, however, "terms of the trust" is broadly interpreted by courts. Thus, the phrase usually means any manifestation of intent by the settlor that admits of proof in judicial proceedings.³⁰ Therefore, even under the more restrictive view, courts recognize the need to promote respect for the intent of the trustor and free alienability of property.³¹

2. *Minority view*

A few states, including California, make a voluntary trust revocable³² by the settlor unless expressly made irrevocable. This view reverses the common law and opposes the majority United States view.³³ The minority view is that a trust is presumed revocable absent express language to the contrary. In California, section 2280 of the Civil Code codifies this view.

a. *Civil Code Section 2280*

As enacted in 1872, California Civil Code section 2280 provided that a trust agreement that did not specify a manner of revocation was deemed irrevocable.³⁴ This original version of the California Civil Code section was identical to the present majority view.³⁵ In 1931,

133 Cal. App. 177, 180, 23 P.2d 1062, 1063 (1933). If the trust consists of an interest in land, the Statute of Frauds requires that extinguishment be done in writing. A. SCOTT, THE LAW OF TRUSTS §343.1, at 2733. In California this rule is embodied in CAL. CIV. CODE §2280 (trust revoked by writing delivered to trustee).

29. See G. BOGERT, LAW OF TRUSTS §148, at 531 (1973); A. SCOTT, THE LAW OF TRUSTS §329A, at 2593-95 (1967).

30. A. SCOTT, THE LAW OF TRUSTS §330, at 2595 (1967).

31. The majority rule on revocability does not apply to Totten, or bank account, trusts, because a power to revoke them is generally implied. G. BOGERT, LAW OF TRUSTS §148, at 532 n.84 (1973) (citing *Stipe v. First Nat'l Bank*, 208 Or. 251, 301 P.2d 175); *id.* §20, at 47 n.81 (citing *Evinger v. MacDougall*, 28 Cal. App. 2d 175, 82 P.2d 194 (1938)).

32. *Mallon*, 44 Cal. 2d 199, 282 P. 2d 481 (1955); see *supra* note 24 and accompanying text.

33. According to a recent survey of trust authorities, the only states to follow the minority view are California (see CAL. CIV. CODE §2280), Oklahoma (see STATS. 1941, tit. 60, §175.41), and Texas (see TEX. TRUST CODE §112.051). A. SCOTT, THE LAW OF TRUSTS §330.1, at 2598 & n.6 (1967 & Supp. 1984).

34. The original code section read,

A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued.

Tit. VIII, ch. 1, art. V (1872).

35. CAL. CIV. CODE §2280. See, e.g., *Gray v. Union Trust Co.*, 171 Cal. 637, 154 P. 306 (1915); see generally Comment, *Trusts and Trustees: Recent Developments in the Tentative*

however, the California Legislature amended the code section to provide that "[u]nless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. . . ."³⁶ Thus, the 1931 amendment to Civil Code section 2280 reverses the California presumption on revocability.

If the trustor and trustee are not the same person, section 2280 must be satisfied to effect a valid revocation.³⁷ Under section 2280, a trust is presumed revocable if the trust instrument does not expressly make the trust irrevocable, despite evidence that the trustor intended the trust to be irrevocable.³⁸ The presumption of revocability indicates legislative intent to treat trust revocation in a more flexible manner. In addition, this view supports the goal of free alienability of property advocated by this comment. The case law interpretation of section 2280 is also important to this discussion.

CALIFORNIA CASE LAW

California appellate courts have reached conflicting results as to whether strict compliance with the revocation method specified in the trust instrument is necessary to effect a valid revocation.³⁹ To demonstrate this conflict, this section will discuss four cases in which the trustor attempted revocation by a method that satisfied section

Trust Doctrine: Influence of Civil Code §2280 on the California Law, 28 CALIF. L. REV. 202 (1940).

36. The entire code section, which has remained unamended since 1931, states:
Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. Trusts created prior to the date when this act shall become a law shall not be affected hereby.

CAL. CIV. CODE §2280. In an earlier version of the bill, no revocation method was specified. In the final chaptered version, however, the legislature inserted a specific revocation method, "by writing filed with the trustee." 1931 Cal. Stat., c. 950, §1 at 1955 (amending CAL. CIV. CODE §2280, May 5, 1931 amended version). Thus, the 1931 amendment, still in effect at this writing, provides a specific method of revocation sufficient to meet the Statute of Frauds. (Recall that an interest in land can be neither created nor extinguished orally. *See supra* note 28).

37. *Miller v. Miller*, 217 Cal. App. 2d 538, 544, 31 Cal. Rptr. 618, 622 (1963).

38. *Gaylord v. Comm'r of Int. Rev.*, 153 F.2d 408, 414-15 (9th Cir. 1946) (revocability of trust not affected by fact that trustor referred to it as irrevocable in federal gift tax returns). "Expressly," for purposes of section 2280, means distinctly, clearly, unmistakably, or in direct terms, as distinguished from impliedly or inferentially. *Newman v. Comm'r of Int. Rev.*, 222 F.2d 131, 135 (9th Cir. 1955). Even with a trust agreement that made the trust irrevocable during a given time period following the death of named persons, one case held that the trust was still revocable because the trust had not expressly been made irrevocable within the meaning of section 2280. *Wells Fargo*, 226 Cal. App. 2d at 458-59, 38 Cal. Rptr. 132, 134-35 (1964).

39. *See supra* note 6.

2280 but did not satisfy the revocation procedure specified in the trust. Analysis of the conflicting cases and application of the trust principles discussed will show that the cases adopting a more flexible revocation approach are the better reasoned decisions.

A. *Fernald v. Lawsten*

*Fernald v. Lawsten*⁴⁰ was the first case to address the validity of a trust revocation meeting Civil Code section 2280 after the code section was amended in 1931. As discussed above, the amendment creates a presumption that trusts are revocable unless expressly made irrevocable.⁴¹ The amendment thus reversed the original version of the code section.⁴²

The *Fernald* trustor, an elderly woman, provided in her trust that the trustee, a male neighbor, was to hold title to the trust property in his name and retain possession during her lifetime unless the parties agreed otherwise in writing.⁴³ Two years after creating the trust, the trustor decided that her attorneys had been correct in advising against allowing her property to be controlled by another person. Accordingly, the trustor revoked the trust by notifying the trustee in writing, as provided by section 2280.⁴⁴

The *Fernald* court held that a valid revocation had occurred, stating that since the statute provided a specific procedure for revoking a voluntary trust, the statutory method should prevail over an agreement between the parties to the contrary.⁴⁵ The court reasoned that although the trust instrument expressly provided a method of revocation, the provision did not declare affirmatively that the trust could not be terminated in a manner other than by agreement of the parties in writing.⁴⁶ Thus, the trust was revocable in accordance with section 2280.⁴⁷ This reasoning suggests that the *Fernald* court would require a provision stating that the trust revocation method was the *exclusive* method contemplated by the parties before denying revocation pursuant to section 2280.

40. 26 Cal. App. 2d 552, 79 P.2d 742 (1938).

41. CAL. CIV. CODE §2280 provides in pertinent part: "Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor. . . ." CAL. CIV. CODE §2280.

42. Compare 1872 Cal. Stat. c. ____ (enacting Cal. Civ. Code §2280) with CAL. CIV. CODE §2280, set forth in full at *supra* note 4.

43. *Fernald*, 26 Cal. App. 2d at 557-58, 79 P.2d at 745.

44. *Id.* at 558, 79 P.2d at 745.

45. See *id.* at 561, 79 P.2d at 747.

46. *Id.* at 560, 79 P.2d at 746-47.

47. *Id.* at 560-61, 79 P.2d at 746-47.

The *Fernald* rule implies that satisfaction of the code section may in some cases be enough to uphold a revocation that did not comply strictly with the trust revocation procedure.⁴⁸ Thus, in the *Hibernia*⁴⁹ case, the trustor would have effected a valid revocation under the *Fernald* rule. Allowing revocation under the facts of *Hibernia* seems to be a fair result, especially when the trustor clearly intended to revoke.

B. *Title Ins. & Trust Co. v. McGraw*

In *Title Ins. & Trust Co. v. McGraw*,⁵⁰ the trustor retained in the documents the right to require the trust property to be sold, and to revoke by ordering a sale and instructing the trustee to pay the proceeds to her.⁵¹ The plaintiff trustor contended that revocation was accomplished when she served a written "notice of rescission" on the trustee, rescinding all prior agreements between them, including the declaration of trust.⁵² Contrary to the trust terms, however, the trustor did not order a sale of the property. The court upheld the revocation even though the trustor had not complied precisely with the trust terms.⁵³ The court reached this result by comparing the facts to those in *Fernald v. Lawsten*.⁵⁴ The *McGraw* court held that, as was the case in *Fernald*, compliance with section 2280 was present and this was sufficient grounds for validating the *McGraw* revocation.⁵⁵ Not all California courts, however, have followed the reasoning of the *Fernald* and *McGraw* decisions. The following two cases illustrate situations in which the court refused to uphold a revocation despite compliance with section 2280.

C. *Rosenauer v. Title Ins. & Trust Co.*

In *Rosenauer v. Title Ins. & Trust Co.*,⁵⁶ the trustor executed an inter vivos trust and provided therein that she could revoke the trust "at any

48. See *id.*

49. 66 Cal. App. 3d 399, 136 Cal. Rptr. 60 (1977); see *supra*, notes 9-16 and accompanying text (discussion of *Hibernia*).

50. 72 Cal. App. 2d 390, 164 P.2d 846 (1945).

51. *Id.* at 395-96, 164 P.2d at 848-49.

52. *Id.* at 393, 164 P.2d at 847.

53. *Id.* at 399, 164 P.2d at 850-51.

54. 26 Cal. App. 2d 552, 79 P.2d 742 (1938); see discussion of *Fernald*, *supra* notes 40-49 and accompanying text.

55. Note that the *McGraw* case arose in the same appellate district as the next case discussed in this section of the comment, *Rosenauer v. Title Ins. & Trust Co.*, 30 Cal. App. 3d 300, 106 Cal. Rptr. 321 (2d. Dist., 1973). As will be-discussed later in this comment, the *Rosenauer* court refused to uphold a revocation complying only with section 2280, yet failed either to discuss or overrule *McGraw* (72 Cal. App. 2d 390, 164 P.2d 846 (1945)). Therefore, even in the same appellate district, the conflict identified in this comment appears to exist.

56. 30 Cal. App. 3d 300, 106 Cal. Rptr. 321 (1973).

time during her lifetime . . . by the Trustor's written instrument *other than a will* filed with the Trustee".⁵⁷ After the death of the trustor, the executor of the estate delivered to the trustee a copy of the will of the trustor, which purported to revoke the trust.⁵⁸ Neither the will nor any other writing purporting to be a revocation of the trust was delivered to the trustee during the lifetime of the trustor.⁵⁹ The executor argued that the revocation should be upheld because by executing a will during life, the trustor effectively revoked any trust provisions that would have been in effect upon death.⁶⁰ The court, however, was apparently motivated by concerns for preventing fraud and encouraging certainty in property disposition, and therefore held that the revocation was ineffective.⁶¹

The *Rosenauer* opinion, however, should not be extended unnecessarily. First, the court actually was faced with the decision of whether revocation had been accomplished pursuant to the trust terms and did not need to address whether compliance with Civil Code section 2280 alone would have been sufficient to work a revocation. The rationale given by the *Rosenauer* court was that "[although] section 2280 was undoubtedly intended to liberalize the power of revocation in California we do not believe it was intended to operate as a nullification of a trustor's plainly expressed preference for a mode of revocation".⁶² Despite rejecting the validity of the revocation in *Rosenauer*, the reasoning of the *Rosenauer* court recognizes that the California legislative approach to trust revocation under section 2280 embodies a flexible approach toward trust construction. This principle of flexibility leads to an inference that the courts, in construing the code section, should adopt a flexible rather than strict approach toward

57. *Id.* at 301-02, 106 Cal. Rptr. at 321-22 (emphasis in original).

58. *Id.* at 302, 106 Cal. Rptr. at 322.

59. *Id.*

60. *Id.*

61. *Id.* at 305, 106 Cal. Rptr. at 323. As support for this holding, the *Rosenauer* court relied primarily on the Restatement of Trusts (Second) §330(1), set forth *supra* n.28 and two Massachusetts cases, *Leahy v. Old Colony Trust Co.*, 326 Mass. 49, 93 N.E. 2d 238 (1950), and *Nat'l Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N.E. 2d 113 (1944). This reliance is notable because these jurisdictions, unlike California, follow the majority view on revocation. Another commentator noted this "gap in logic" but felt that the *Rosenauer* result was justified because the decision provides needed security for trustees. Bird, *supra* note 27, at 568. The Bird commentary emphasizes concern for the beneficiaries, an issue which is outside the scope of this comment (*id.* at 54). The *Rosenauer* result may be justified on other grounds as well, but those arguments do not affect the thesis advocated herein. See *infra* note 69 and accompanying text.

62. 30 Cal. App. 3d at 304, 106 Cal. Rptr. at 323. Note that the *Rosenauer* court gave no authority for the hyperbolic suggestion that, unless controlled, Civil Code section 2280 could operate to defeat all trust revocation methods. *Id.* at 304.

attempted revocations if the intent of the trustor to revoke is clear.

Other reasons suggest that *Rosenauer* should be limited to the facts of the particular case. The language of the decision reveals an unrealistic, misplaced respect for the intent of the trustor at the time of trust creation, while ignoring the actual present intent of the trustor at the time of attempted revocation.⁶³ Additionally, *Rosenauer* also attempted to recharacterize the argument of the plaintiff in favor of revocation. This reasoning weakens the persuasive value of the decision. The court stated that the thrust of Civil Code section 2280 is to remove any doubt concerning the *revocability* of a trust that is silent on the subject of revocation.⁶⁴ Revocability was not at issue in *Rosenauer*. The *method* of revocation was actually in question. Furthermore, the court also cautioned against construing section 2280 as an exclusive method of revocation when the trust contains a revocation procedure.⁶⁵ The plaintiff, however, had never contended that Civil Code section 2280 was to be construed in that manner. This contention was not needed to support the argument of the plaintiff that revocation which satisfied the code was only *one* permissible method as opposed to the exclusive method.⁶⁶ In addition, the *Rosenauer* court did not address the reasoning used in *Fernald*, a case addressing a similar issue.⁶⁷ The hostility of the *Rosenauer* court toward revocation pursuant to Civil Code section 2280 appears to have led the court away from the main issue, which was not revocability but rather the efficacy of an attempted revocation.

The most persuasive reason for limiting the application of the language in *Rosenauer* is that the decision could have been reached without ever discussing Civil Code section 2280. The trustor in *Rosenauer* attempted to revoke an inter vivos trust by will.⁶⁸ Since authorities disagree on whether a will can ever revoke an inter vivos trust,⁶⁹ the court could have invalidated the revocation solely because

63. See *infra* note 118 and accompanying text (discussion of intent of trustor).

64. *Rosenauer* at 304, 106 Cal. Rptr. at 323.

65. *Id.*

66. Note that even *Fernald*, which held that the code prevailed over a contrary trust revocation procedure, stopped short of attempting to characterize the code as an exclusive revocation method.

67. *Fernald*, 26 Cal. App. 2d 552, 79 P.2d 742 (1938).

68. *Rosenauer*, 30 Cal. App. 3d at 303, 106 Cal. Rptr. at 322.

69. Authorities disagree on whether a provision reserving a power of revocation empowers the settlor to revoke by will as well as by inter vivos transaction. A. SCOTT, THE LAW OF TRUSTS §330.8, at 2608 n.10 (Supp. 1984). The authorities denying revocation of inter vivos trusts by will reason that a will is ineffective until the testator dies, and by that time the rights of the beneficiaries have vested and the settlor no longer has any interest in the subject matter

the trustor attempted to do so by will. Therefore, although *Rosenauer* is supportable on the facts before that court, the result can become harsh if extended to other situations. One example of this result is found in *Hibernia Bank v. Wells Fargo Bank*.

D. Hibernia Bank v. Wells Fargo Bank

The *Hibernia* case presents several factors supporting a revocation⁷⁰ made in compliance with section 2280, without increasing the possibility of fraud or uncertainty in property disposition. The trust in *Hibernia* contained a very complex revocation procedure. The trust could not be revoked unless (1) the attorney of the trustor approved the revocation in writing; (2) a notice of revocation was signed by the trustor, notarized, bore the written approval of the attorney of the trustor, and was delivered to and received by the trustee; and (3) at least sixty days elapsed after delivery to and receipt by the trustee of the notice of revocation.⁷¹

Twenty-two days after executing the trust, while confined to a convalescent hospital, the *Hibernia* trustor told three hospital employees that she wanted to revoke her trust because she no longer desired the primary beneficiary named in the trust agreement.⁷² In the presence of the hospital employees, the trustor signed a statement expressing these wishes.⁷³ A few weeks later a conservator was appointed for the trustor, and the attorney for the conservator immediately sent the trustee a photocopy of the purported revocation together with a letter expressing the consent of the conservator to revocation.⁷⁴ Unfortunately, the trustor died fifteen days later, before the required sixty-day waiting period had elapsed.⁷⁵ Litigation followed on the issue

to revoke. See *Supreme Lodge of Fraternal Brotherhood v. Price*, 27 Cal. App. 607, 623, 150 P. 803, 809 (1915); RESTATEMENT (SECOND) OF TRUSTS §330 comment j (1957); see, e.g., *Hill v. Conover*, 191 Cal. App. 2d 171, 183, 12 Cal. Rptr. 522, 529 (1961). But see *Sanderson v. Aubrey*, 472 S.W. 2d 286, 288 (1971), wherein the Texas Court of Appeals upheld a revocation by will under a statute similar to CAL. CIV. CODE §2280, by applying the "dual character" theory of wills. For more information on this theory, which considers wills to be testamentary in part but operative *in praesenti* in others, see Note, *The Revocation of an Inter Vivos Trust by a Will*, 24 BAYLOR L. REV. 274 (1972).

70. *Hibernia*, 66 Cal. App. 3d 399, 136 Cal. Rptr. 60 (1977); see *supra* notes 9-16 and accompanying text (presenting the *Hibernia* case as an illustration of the conflict examined in this comment).

71. *Hibernia*, 66 Cal. App. 3d at 402, 136 Cal. Rptr. at 61.

72. *Id.*

73. *Id.*

74. *Id.* at 401-02, 136 Cal. Rptr. at 61-62. Note that Civil Code section 2280 was satisfied since the trustor had a written revocation delivered to the trustee. See *supra* notes 34-38 (discussion of section 2280).

75. *Hibernia*, 66 Cal. App. 3d at 402, 136 Cal. Rptr. at 62.

of whether or not the actions of the trustor constituted a valid trust revocation.

The special administrator of the estate of the trustor argued that so long as section 2280 was satisfied, compliance with the entire trust procedure was not necessary because that code section as interpreted by *Fernald*⁷⁶ provides a specific procedure for revoking a voluntary trust that prevails over any agreement to the contrary between the parties.⁷⁷ Defendant trustee, on the other hand, resisted revocation by arguing that (1) section 2280 was inapplicable to the trust involved in the litigation;⁷⁸ (2) *Fernald* was improperly reasoned;⁷⁹ and (3) the court should follow the *Rosenauer* interpretation of Civil Code section 2280 rather than the interpretation of the *Fernald* court.⁸⁰ The *Hibernia* court accepted the trustee's latter arguments and held the attempted revocation invalid.⁸¹ The result in *Hibernia*, however, contravened the clearly expressed intent of the trustor.

This comment proposes that the policies underlying section 2280 can support a more flexible approach, while still recognizing competing goals of preventing fraud and encouraging certainty in property disposition.⁸² The following section will show that the reasoning of *Hibernia* is not persuasive and should therefore be discarded in favor of the reasoning of *Fernald* and *McGraw*.

E. Analysis of Conflicting Case Law

The problem with the *Hibernia* decision is that the court mischaracterized *Fernald*. The *Hibernia* court rejected *Fernald* in favor of *Rosenauer*, but in order to do so the *Fernald* decision was misconstrued. Moreover, the *Hibernia* criticisms of *Fernald* can be rebutted.

First, *Hibernia* states that *Fernald* was not based upon precedent. The reason for this may be that the *Fernald* court was the first to address the issue after the applicable code section was amended

76. *Fernald*, 26 Cal. App. 2d at 561, 79 P.2d at 747 (1938); see also *supra* notes 40-49 and accompanying text.

77. *Hibernia*, 66 Cal. App. 3d at 403, 136 Cal. Rptr. at 62.

78. The court disposed of this argument by noting that although California Civil Code section 2250 appears to restrict the application of section 2280 to trusts created solely for the benefit of another, the revocation of a trust creating a life estate in the trustor, as in *Hibernia*, is also governed by section 2280.

79. *Hibernia*, 66 Cal. App. 3d at 402, 136 Cal. Rptr. at 62 (citing *McGraw*, 72 Cal. App. 2d at 399-400). *Hibernia*, 66 Cal. App. 3d at 403, 136 Cal. Rptr. at 62.

80. *Id.*

81. *Id.* at 404, 136 Cal. Rptr. at 63.

82. See *supra* note 4.

effecting reversal of the law of revocability in California.⁸³ Under these circumstances, especially since the amendment embodied the minority view in the United States, precedent directly on point is unlikely to exist. Therefore, this criticism of *Fernald* alone is not convincing.

Second, the *Hibernia* court conceded that the law favors free revocability of trusts in the interest of alienability of property but argued that the alienability policy is not furthered by "denying" a trustor the power to specify the manner of revocation.⁸⁴ The court felt that the ultimate effect of *Fernald* was to require a trustor to create either an irrevocable trust or one freely revocable upon written notice.⁸⁵ Application of the *Fernald* reasoning in proper circumstances, such as the *Hibernia* case, would not have the effect of denying a trustor the power to specify a revocation procedure when the trust is created. The trustor remains free to specify any revocation method, and revocation pursuant to Civil Code section 2280 would further the policy of alienability the *Hibernia* court concedes is so important. No support exists for giving more weight to policy considerations such as alienability at the time the trust is created than at the time the trust is revoked. The injustice that results is obvious in a situation like that in *Hibernia*. In *Hibernia*, only twenty-two days had elapsed since trust creation, the trustor clearly wished to revoke, and she had substantially complied with the very complicated revocation procedure specified in the trust.

Another reason given by the *Hibernia* court for rejecting *Fernald* carries little weight. *Hibernia* stated that application of *Fernald*, "... would not allow [the trustor] to protect himself from the consequences of his whim, caprice, momentary indecision, or of undue influence by other persons."⁸⁶ One commentator suggests that if a trustor creates a trust in a moment of wisdom for his own protection, he should not be permitted later in a "moment of folly" to deprive himself of that protection.⁸⁷ The commentator responds that if the trustor is the sole present beneficiary of the trust, as in *Hibernia*, nobody but the trustor has any beneficial interest in the property, and the trustor should be permitted to revoke the trust.⁸⁸

83. *Hibernia*, 66 Cal. App. 3d at 404, 136 Cal. Rptr. at 63.

84. *Id.*

85. *Id.*

86. *Id.* The thrust of this argument is seriously weakened by recognition that these goals can be achieved through creation of an irrevocable trust. A major feature of the revocable trust is the potential to modify or terminate it if one wishes. BLACK'S LAW DICTIONARY at 1187 (5th. ed. 1979).

87. A. SCOTT, THE LAW OF TRUSTS §339, at 2699 (1967).

88. *Id.*

The *Hibernia* court, attempting to discredit the *Fernald* decision, distinguished *Fernald* as involving a trustor as sole beneficiary, whereas *Hibernia* involved a trustor as a life income beneficiary.⁸⁹ However, this attempt to draw a distinction was irrelevant, since, as the *Hibernia* court conceded, revocation is governed by Civil Code section 2280 regardless of the interest of the trustor.⁹⁰

Probably the weakest reason the *Hibernia* court gave for rejecting *Fernald* was the statement that the "actual basis" for revocation of the *Fernald* trust had been constructive fraud on the part of the trustee.⁹¹ Examination of the cited portions of the *Fernald* opinion reveals that the *Hibernia* court recharacterized the basis of the *Fernald* holding. The *Fernald* court only considered the constructive fraud theory as an alternate theory for relief.⁹²

The reasons the *Hibernia* court gave for following the *Rosenauer* precedent have some merit, but the reasons given for rejecting or distinguishing *Fernald* are weak and rebuttable. In *Rosenauer*, the trust specifically required revocation during the lifetime of the trustor. Revocation, however, was attempted by will.⁹³ The *Rosenauer* situation raises fewer concerns about frustrating the intent of the trustor since the trustor selected a relatively simple condition of revocation, lifetime exercise of the power, but apparently made no attempt to comply with that condition.⁹⁴ In choosing to follow the more conservative *Rosenauer* view, the *Hibernia* court gave almost no attention to the equity and policy considerations present when a court is faced with the validity of a trust revocation.⁹⁵ As compared to the *Rosenauer* trustor, whose trust contained a relatively simple revocation condition, the ailing *Hibernia* trustor was less likely to have given much

89. *Hibernia*, 66 Cal. App. 3d at 405, 136 Cal. Rptr. at 63.

90. *Id.* at 404, 136 Cal. Rptr. at 62.

91. *Id.* at 404, 136 Cal. Rptr. at 63.

92. After establishing that a confidential relationship existed between the trustor and trustee, and that the trustee had refused to reconvey the trust property to the trustor upon request, the *Fernald* court stated that in such circumstances constructive fraud is presumed. *Fernald*, 26 Cal. App. 2d at 562, 79 P.2d at 748. Describing the relief available in such circumstances, the *Fernald* court said, "... equity will enforce a reconveyance of the property on the ground of constructive fraud. Moreover, section 2280 of the Civil Code specifically provides for a revocation of such a voluntary trust." *Id.* (emphasis added). The use of the word "moreover" in that context indicates that the court in *Fernald* considered the Civil Code method of revocation a separate form of relief from the constructive fraud remedy.

93. Of course, if the trustor-testator had mistakenly thought execution of the will during life would satisfy the lifetime revocation requirement, the court may have reached the opposite conclusion. See *supra* note 19 and accompanying text.

94. *Rosenauer*, 30 Cal. App. 3d at 303, 106 Cal. Rptr. at 322.

95. See *infra* notes 109-13 and accompanying text (discussion of equity considerations); *infra* notes 114-28 and accompanying text (discussion of policy considerations).

reflection to the complex provisions of the legal documents she signed.

In light of the foregoing discussion, the *Fernald* decision appears better reasoned than *Hibernia*. The rule of *Fernald* may be applied without violating other principles of trust law. Furthermore, as will be shown, the *Fernald* opinion comports with considerations of statutory construction, equity and public policy.

APPLICATIONS OF CIVIL CODE SECTION 2280

A. *Statutory Construction—Legislative Intent*

Important rules of statutory construction, equitable considerations, and policy factors all favor the *Fernald/McGraw* interpretation of section 2280, allowing a trustor to revoke by satisfying the provisions of that section even though contrary to trust terms. Several presumptions apply to legislative enactments. First, the law presumes that the legislature did not intend to overthrow a valid legal principle, absent a contrary expression in unmistakable language.⁹⁶ Similarly, courts will presume that the legislature never intends to do injustice, work public inconvenience or private hardship.⁹⁷ Therefore, section 2280 cannot be presumed to conflict with existing trust law considerations.

An accepted method of ascertaining legislative intent is to consider the prevailing conditions that moved the legislature to enact a law.⁹⁸ The only source of information on legislative intent of 1931, when Civil Code section 2280 was amended to its present version, is the comparison of an earlier version of the bill to the enacted version.⁹⁹ The earlier version did not specify any *method* of revocation, whereas the enacted version provided that revocation would be by writing filed with the trustee. This amendment demonstrates that the legislature considered whether to specify a method in the legislation and decided that the writing requirement was sufficient.

Similarly, the law presumes that the legislature intends that enactments be in accord with settled principles of public policy.¹⁰⁰ As an aid in ascertaining legislative intent, the conditions surrounding the act, history, and purposes may also be considered.¹⁰¹ The sole amend-

96. F. McCaffrey, *STATUTORY CONSTRUCTION* §10, at 37 (1953).

97. *Id.*, citing *Gibson v. Jenney*, 15 Mass. 205.

98. 1 W. BLACKSTONE, *COMMENTARIES* 61, cited in F. McCaffrey, *STATUTORY CONSTRUCTION* §5, at 13.

99. 1931 Cal. Stat., c. 950, §1 at 1955 (amending CAL. CIV. CODE §2280).

100. F. McCaffrey, *STATUTORY CONSTRUCTION* §34, at 64 (1953). See *infra* notes 114-28 and accompanying text (discussion of policy factors).

101. F. McCaffrey, *STATUTORY CONSTRUCTION* §6, at 17.

ment to Civil Code section 2280 in the 113-year history of the statute not only set forth a revocation method but also reversed the majority and common law view on revocability.¹⁰² Thus, the legislature must have considered that the method set forth in the code section would further important policy goals in the area of trust revocation.

1. *Doctrines of Implications And Casus Omissus*

The doctrine of implications is the method used to ascertain provisions not specified in a statute but necessarily implied by the general terms of the statute.¹⁰³ The doctrine is an important principle of statutory construction because what is necessarily implied is just as much a part of the statute as what is expressly written therein.¹⁰⁴ The doctrine, however, should be limited to strictly necessary incidents or logical consequences of the statute as enacted.¹⁰⁵ The *Rosenauer* case, for example, erroneously attempted to apply the doctrine, stating that section 2280 applies only if the trust is silent or ambiguous regarding a revocation method.¹⁰⁶ Since no legislative history was cited to support this purported restriction upon the applicability of the code section, this interpretation cannot be said to represent a "necessary incident or logical consequence" of the statute.

A similar doctrine used in statutory construction, *casus omissus*, refers to situations inadvertently omitted from the language of the statute.¹⁰⁷ Although the courts may interpret a code section to give effect to what appears to be the general policy of the law, a *casus omissus* cannot be supplied by the courts.¹⁰⁸ Thus, the courts cannot presume that the legislature inadvertently failed to notice for over half a century that the code section had been given an overbroad scope. If the legislature had wished to restrict section 2280 to situations in which the trust fails to specify a revocation procedure, the legislature could have done so.

B. *Equitable Considerations*

The rules of equity are more flexible than those of the common

102. See *supra* notes 26-31 and accompanying text, discussing majority view on revocability.

103. F. McCaffrey, STATUTORY CONSTRUCTION §6, at 16 (1953).

104. *Id.* (citing *People v. Meakim*, 133 N.Y. 214).

105. F. McCaffrey, STATUTORY CONSTRUCTION §6, at 16, 21 (1953).

106. *Rosenauer v. Title Ins. & Trust Co.*, 30 Cal. App. 3d 300, 304, 106 Cal. Rptr. 321, 323 (1973).

107. F. McCaffrey, STATUTORY CONSTRUCTION, §7, at 25 (1953) (citing *McKuskie v. Hendrickson*, 128 N.Y. 555). The rationale for this rule is that to permit the courts to enlarge legislation would be a violation of the doctrine of separation of powers. *Id.*

108. F. McCaffrey, STATUTORY CONSTRUCTION §7, at 25 (1953).

law, and the courts have greater discretion in administering equitable remedies than common law remedies.¹⁰⁹ Therefore, application of equitable principles to trust revocation requirements will promote the chief goal of equity, namely, achievement of justice in any particular case.¹¹⁰ Although equitable and common law remedies are now administered by a single court system, equity continues to exist as a separate system of rights, remedies and procedure, modifying common law remedies when necessary.¹¹¹

Equity principles can be applied in trust litigation because trust law was included in the English common law scheme of equity jurisprudence, which was adopted by the American courts.¹¹² Trust law has solid foundations in equity and therefore equitable principles are appropriately considered in determining the validity of a trust revocation.¹¹³ Cases ignoring equitable considerations are more likely to reach an unfair result in the trust revocation context. Although "equitable considerations" are hard to define, courts generally strive to achieve the most fair result in the particular case. A fair result is within the broad discretionary power of the court, based on a tradition of applying equitable principles to trust cases.

C. Policy Factors

A key principle in modern property law is the assumption that freedom to alienate property interests is essential to the welfare of society.¹¹⁴ The rationale for this policy has been stated in several ways. First, society should be maintained and controlled primarily by living members. Second, the current use of wealth should be facilitated. Third, property should be kept responsive to the needs of the current beneficial owners.¹¹⁵ California likewise favors free alienability of property and free revocability of trusts by the trustor.¹¹⁶ Therefore, judicial

109. H. McCLINTOCK, *PRINCIPLES OF EQUITY* §1, at 2 (1948).

110. *Id.*

111. *Id.* §7, at 16.

112. G. BOGERT, *LAW OF TRUSTS* §6, at 14 (1973).

113. *Id.*

114. *RESTATEMENT (SECOND) OF PROPERTY*, Donative Transfers, at 143 (1983).

115. *Id.* at 10. For an expanded discussion of the rationale, see *RESTATEMENT (SECOND) OF PROPERTY*, Perpetuities and Other Social Restraints, Part I, Introductory Note, at 2129-33.

116. *Bixby v. Calif. Trust Co.*, 33 Cal. 2d 495, 498, 202 P.2d 1018, 1019 (1949) (trustor who was sole beneficiary could compel termination of trust in the absence of a showing of incapacity or other reason why trustor should not be permitted to exercise control over trust property); see also *Heifetz v. Bank of America*, 147 Cal. App. 2d 776, 785, 305 P.2d 979, 985 (1957) (trustor had right to make self and daughter sole beneficiaries, to exclusion of all other remaindermen, then terminate trust with consent of daughter); *Fernald*, 26 Cal. App. 2d at 560, 79 P.2d at 747 (1938) (trust revocable because revoked pursuant to Civil Code section 2280, which prevailed over contrary revocation method set forth in trust instrument).

decisions that have the effect of restraining the power of a trustor to alienate property are contrary to strong public policy goals.

Although free alienability must sometimes be limited in order to protect the expectancies of other persons, this limit has not always defeated the power to alienate property. For example, a trustor may lawfully exercise any right of revocation or amendment found within the four corners of the trust instrument without regard to the effects on rights of remaindermen, since no duty is owed them to refrain from exercising any reserved right.¹¹⁷ This principle supports the concept of flexible alienability. Since a California trustor has the right to eliminate all beneficiaries and revoke at any time, courts need not deny revocation by the procedure specified in section 2280 in order to protect the rights and expectations of beneficiaries and remaindermen. Encouraging the goal of free alienability does not hinder the contrary policy of encouraging certainty in property disposition, in light of the very important policy of respecting the intent of the trustor to revoke.

Closely related to the policy of free alienability is the principle that the intention of the trustor should control, unless contrary to another compelling public policy.¹¹⁸ In practice, this principle means that a trustor should be able to dispose of property freely. The initial intention of the trustor to impose conditions on trust revocability should not preclude the trustor from effecting a valid revocation by section 2280 should that intention change.

The weight of authority, including California¹¹⁹ and the Restatement of Trusts,¹²⁰ suggests that a settlor who is the sole beneficiary can revoke his trust at any time, absent a showing of incapacity or other sufficient reason, even though the trust purposes have not been accomplished fully.¹²¹ Since a settlor who is also the sole beneficiary

117. *Heifetz*, 147 Cal. App. 2d at 783, 305 P.2d at 983-84.

118. A. SCOTT, *THE LAW OF TRUSTS* §337, at 2655 (1967); *see also* *United Cal. Bank v. Bottler*, 16 Cal. App. 3d 610, 618-19, 94 Cal. Rptr. 227, 232 (1971). One law review note criticizes the harshness of a Wisconsin decision that refused to uphold a revocation when the only condition not met was the failure of one trustee to sign the revocation notice until after his return from Europe, by which time the trustor had passed away. The note suggested that concepts of "strict" or "liberal" construction are irrelevant to considerations of trust revocation methods that do not comply exactly with the trust terms. Further, the note suggested that absent a clear public policy, an instrument should be construed to effectuate the intent of the parties rather than test for strict compliance with the trust terms. This approach is especially valid when the only unmet condition was concurrence by one trustee, since the lack of such concurrence is immaterial to the question of the intent of the settlor. Note, *Trusts — Exercise of Power of Revocation*, 26 MICH. L. REV. 586 (1928).

119. *Bixby*, 33 Cal. 2d at 497, 202 P.2d at 1018-19.

120. RESTATEMENT (SECOND) OF TRUSTS §339 and comment a (1957).

121. A. SCOTT, *THE LAW OF TRUSTS* §339, at 2694 (1967).

can revoke the trust at any time for any reason, language in cases refusing to uphold a revocation that satisfied section 2280 because of concerns with protecting trustors from their own folly are being overly cautious and provide only illusory protection. Additionally, such results may actually punish the trustor for inserting a revocation method. No one else is affected by revocation, especially if the trustor is the sole beneficiary, and revocation should be granted regardless of compliance with the trust revocation terms.

1. Provisions Solely For Benefit Of Trustee

In the *Hibernia* case used for illustration earlier in this comment,¹²² the trustor not only satisfied section 2280, but also substantially complied with the trust revocation terms. The revocation did not comply with the terms requiring notice to and approval by the trustee, and an unelapsed time period.¹²³ This type of time period requirement typically operates as a notice period for the trustee. One commentator suggests that a revocation may be upheld despite a lack of exact compliance with trust terms if the only conditions not satisfied are those intended merely for the protection of the trustee.¹²⁴ If the only unsatisfied trust terms are of this type, revocation should be upheld so long as the trustor has complied with section 2280.

2. Substance Over Form

If the trustor has substantially complied with the trust terms and Civil Code section 2280 has been satisfied, the equitable principle of substance over form provides an additional reason for upholding the revocation. For example, in *Duncan v. Kahn*,¹²⁵ a trustee failed to sign the termination notice but performed all other acts sufficient to constitute ratification of the notice.¹²⁶ The court held that a denial of the termination would be "hypertechnical."¹²⁷ This holding illustrates the policy of giving effect to substance over form in legal

122. See *supra* notes 9-16 and accompanying text (presentation of *Hibernia* case to illustrate the conflict examined in this comment).

123. *Hibernia*, 66 Cal. App. 3d at 402, 403, 136 Cal. Rptr. at 61.

124. A. SCOTT, *THE LAW OF TRUSTS* §330.8, at 2608 (1967). Note that Scott makes this statement even without considering the availability of a provision like Civil Code section 2280. The existence of this code section reinforces the Scott argument by providing added assurance of satisfying the intent of the trustor and meeting the Statute of Frauds.

125. 151 Cal. App. 2d 402, 311 P.2d 587 (1957).

126. *Id.* at 404, 311 P.2d at 589.

127. *Id.* at 406, 311 P.2d at 590.

transactions, and supports the flexible approach to trust revocation advocated by this comment.¹²⁸

CONCLUSION

This comment has discussed the conflict existing in California concerning the validity of a trust revocation that complies with section 2280 but does not comply with the trust terms. Selected cases have indicated the harshness of requiring strict compliance with the trust terms in certain situations. Trust law rules were set forth and applied to Civil Code section 2280. Based on principles of statutory construction, equity, and public policy, this comment has argued that a revocation should be effective when Civil Code section 2280 is satisfied and revocation would serve these well-settled principles, even though the trust revocation method was not strictly followed.

Application of the more flexible approach to revocation will not hinder competing interests of defeating fraud and encouraging certainty in property disposition, so long as Civil Code section 2280 is satisfied and other appropriate equity and policy factors exist. Factors in favor of permitting revocation based on compliance with Civil Code section 2280 include rules of statutory construction leading to presumptions that the legislature intended to recognize public policy and avoid injustice in enacting the statute. Equitable foundations of trust law, including concerns of fairness, also support a flexible approach toward alienation. Finally, recognized policy goals encourage free alienability of property and respect for the intent of the settlor. Section 2280 provides sufficient safeguards to rebut competing considerations, and revocation pursuant to the code section will achieve the better result in many trust revocation situations.

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128. Professor Powell suggests that strict formalism in trust revocation "is justifiable only to the extent that it assures clarity in an act which operates to change the rights of parties." 4 R. POWELL, *THE LAW OF REAL PROPERTY* §565, at 428.40(1) (rev. ed. 1981). Formalism would not appear to be justified, especially if the only party affected by a revocation is the settlor. *See id.*

